(1)

Supreme Court, U.S.
FILED

96 No. 290 AUG 19 1996

OFFICE OF THE CLERK

In The
**Supreme Court of the United States**

October Term, 1995

OKLAHOMA PUBLISHING COMPANY
and RICHARD A. CLARK,

*Petitioners,*

*vs.*

VERLA B. BURKS,

*Respondent.*

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

# PETITION FOR A WRIT OF CERTIORARI

GARY C. PIERSON
Counsel of Record
Nathan L. Whatley
LYTLE SOULÉ & CURLEE, P.C.
Attorneys for Petitioner
119 N. Robinson, Suite 1200
Oklahoma City, Oklahoma 73102
(405) 235-7471

33 pp

## QUESTION PRESENTED

After 100 years of silence on the subject, should this Court resolve the conflicting standards of review now being used by the Circuit Courts? Specifically, in reviewing a trial court's decision to exclude a witness who has knowingly violated an order of sequestration entered under Rule 615, Fed.R.Evid., should the Circuit Court scrutinize the record for evidence that the party seeking exclusion would suffer probable prejudice and that the violation occurred with the knowledge or complicity of the opposing party, or should the Circuit Court give deference to the District Court's exercise of its discretion in excluding the witnesses based upon a presumption of prejudice occurring when the sequestration order is violated and upon the trial court's superior position to observe the trial and determine if exclusion is appropriate?

## LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party, however, defendant/respondent Oklahoma Publishing Company has one affiliated company that has issued shares to the public, American City Business Journals, Inc.

## TABLE OF CONTENTS

Question Presented ..... i

List of Parties ..... ii

Table of Contents ..... iii

Table of Authorities ..... iv

Opinions Below ..... 2

Statement of Jurisdiction ..... 2

Statute Involved ..... 2

Statement of the Case ..... 3

Reasons for Granting the Writ ..... 4

Conclusion ..... 8

Appendix ..... A-1

## TABLE OF AUTHORITIES

### CASES

Cox. v. Sandia Corp.,
941 F.2d 1124 (10th Cir. 1991) ..... 6

Holder v. United States,
150 U.S. 91 (1893) ..... 4, 5, 6

Jerry Parks Equipment Co., v. Southeast Equipment Co., Inc.,
817 F.2d 340 (5th Cir. 1987) ..... 5, 6

Rowan v. Owens,
752 F.2d 1186 (7th Cir. 1984)
cert. denied, 476 U.S. 1140 (1984) ..... 4, 5

United States v. Benally,
756 F.2d 773 (10th Cir. 1985) ..... 5

United States v. Brewer,
947 F.2d 404 (9th Cir. 1991) ..... 7

United States v. Burgess,
691 F.2d 1146 (4th Cir. 1982) ..... 7

United States v. Clavis,
956 F.2d 1079 (11th Cir. 1992)
cert. denied, 112 S. Ct. 2979 ..... 5, 6

United States v. Ell,
718 F.2d 291 (8th Cir. 1983) ..... 7

United States v. Greschner,
802 F.2d 373 (10th Cir. 1986) ..... 7

United States v. Hobbs,
31 F.3d 918 (9th Cir. 1994) ..... 5

United States v. Jackson,
60 F.3d 137 (2nd Cir. 1995) ..... 7

United States v. McClure,
734 F.2d 484 (10th Cir. 1984) ..... 5

United States v. Swink,
21 F.3d 852 (8th Cir. 1994) ..... 5

United States v. Wright,
826 F.2d 938 (10th Cir. 1987) ..... 6

**FEDERAL STATUTES**
**AND**
**RULES**

28 U.S.C. §1254(1) ..... 2

Rule 615, Fed. R. Evid. ..... 2, 7

**STATE STATUTES**

25 O.S. 1991 § 1101, et seq ..... 3

No.

---

In the
Supreme Court of the United States

---

October Term, 1995

OKLAHOMA PUBLISHING COMPANY
and RICHARD A. CLARK,

*Petitioners,*

*vs.*

VERLA B. BURKS,

*Respondent.*

---

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

---

# PETITION FOR A WRIT OF CERTIORARI

---

Petitioners, Oklahoma Publishing Company and Richard A. Clark, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 81 F.3d 975 and is reproduced in the Appendix filed herewith ("App.") at A-1 through A-11. The unreported judgments of the District Court are reproduced in the Appendix at A-12 through A-16, and the Tenth Circuit's order denying rehearing is reproduced at A-17 through A-18.

## STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 15, 1996. Petitioners filed a petition for rehearing and suggestion for rehearing in banc on April 29, 1996, and the Court of Appeals issued an order denying the petition for rehearing on May 21, 1996. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

Rule 615, Fed.R.Evid., provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

## STATEMENT OF THE CASE

Respondent brought suit against petitioners in the United States District Court for the Western District of Oklahoma. Respondent's complaint alleged three causes of action against petitioners, Oklahoma Publishing Company ("OPUBCO") and Clark, jointly. Respondent's first cause of action was for sex discrimination in violation of Title VII. Respondent's second cause of action was for age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). Respondent's third cause of action was for discrimination in violation of Oklahoma's public policy as set forth in Oklahoma's Anti-Discrimination Act, 25 O.S. 1991 § 1101, et seq. All three of these claims were based on respondent's allegation that she was constructively discharged from employment by Clark on May 17, 1991. Respondent's fourth cause of action was brought against Clark only and alleged that he intentionally interfered with respondent's business relations with OPUBCO.

Respondent's age, public policy and interference with business relations claims were tried to a jury which returned a verdict in favor of petitioners on all claims. Respondent''s Title VII sex discrimination claim was decided by the District Court, which likewise found that respondent failed to prove her claim. At trial, respondent invoked Rule 615 and asked the District Court to sequester all witnesses who were not parties to the case. Nevertheless, one of respondent's two witnesses, Lisa Gatewood, admitted that she violated the District Court's sequestration order and was present during part of the testimony of respondent's chief witness, Gwen Pritchett. Gatewood had previously been advised by plaintiff's counsel and the District Court's staff that she was not to enter the courtroom until she was called to testify. The District Court prohibited Gatewood

from testifying as a rebuttal witness for respondent as a sanction for her violation of the order.

Respondent raised four issues before the Tenth Circuit: (1) that the District Court erred in instructing the jury on the issue of constructive discharge; (2) that the District Court abused its discretion by denying respondent's application to add a former co-worker, Lisa Gatewood, to her list of witness for her case in chief; (3) that the District Court abused its discretion by refusing to allow Gatewood to testify as a rebuttal witness, after she admittedly violated the court's sequestration order; and (4) that the District Court abused its discretion in overruling respondent's motion to compel discovery.

The Tenth Circuit affirmed the District Court's rulings on the first, second and fourth issues raised by respondent, but reversed the District Court's decision to exclude Gatewood as a sanction for her violation of the sequestration order. The Tenth Circuit held that the District Court abused its discretion because the exclusion of Gatewood was not based upon a finding of "probable prejudice" to the petitioners and because there was no evidence that respondent or her counsel knew of, or in bad faith allowed, the violation.

On April 29, 1996, petitioners filed a petition for rehearing on this issue. Petitioners' petition was denied on May 21, 1996.

## REASONS FOR GRANTING THE WRIT

This Court last addressed the appropriate standard for reviewing a District Court's sanction for a violation of a sequestration order over 100 years ago in Holder v. United States, 150 U.S. 91 (1893). A split has recently developed

between the Circuit Courts on the appropriate standard for reviewing a trial court's exclusion of a witness who has violated a sequestration order. The lack of any modern guidance on this issue has led to the development of two opposite approaches by the Circuit Courts and has resulted in irreconcilable rulings. See e.g., Rowan v. Owens, 752 F.2d 1186 (7th Cir. 1984) cert denied 476 U.S. 1140 (1984) (to prevent a witness who has violated the rule from testifying is a natural sanction for the violation); United States v. McClure, 734 F.2d 484 (10th Cir. 1984)(the good faith of a party and her counsel is not determinative of whether that witness should be allowed to testify); United States v. Hobbs, 31 F.3d 918 (9th Cir. 1994) (disqualification of witness is a strongly disfavored sanction for violation of a sequestration order which requires showing of prejudice or complicity on the part of the party calling the witness).

Following Holder, the Fifth, Seventh, Eleventh and, in two earlier decisions, Tenth Circuit Courts of Appeals have reviewed the exclusion of a witness who has violated a sequestration order simply for an abuse of discretion. Owens, supra; Jerry Parks Equipment Co., v. Southeast Equipment Co., Inc., 817 F.2d 340 (5th Cir. 1987); United States v. Clavis, 956 F.2d 1079 (11th Cir. 1992) cert denied 112 S.Ct. 2979; McClure, supra; United States v. Benally, 756 F.2d 773 (10th Cir. 1985). In each of these cases, the District Court excluded witnesses who violated a sequestration order and the Circuit Court affirmed under a lenient abuse of discretion standard of review. The Eighth Circuit embraced a similar standard of review for orders excluding witnesses who violate a sequestration order in United States v. Swink, 21 F.3d 852 (8th Cir. 1994).

On the other hand, the Ninth Circuit, in United States v. Hobbs, 31 F.3d 918 (9th Cir. 1994), recently adopted a much more stringent test and held that a District Court's decision to exclude a witness who violates a sequestration order must be reversed where there is no evidence of "misbehavior" or complicity on the part of the party offering the witness. The panel below departed from the earlier Tenth Circuit rulings in McClure and Benally and ruled in accordance with the Ninth Circuit's ruling in Hobbs. This standard of review abandons the traditional abuse of discretion analysis and replaces it with one that places the burden upon the party requesting the exclusion of a witness to prove "probable prejudice" and knowledge or collusion on the part of the opposing party or her counsel.

Although the panel referred to its analysis as a review for an abuse of discretion, that is not the standard that was employed. An abuse of discretion occurs when a judicial determination is "arbitrary, capricious or whimsical." Cox. v. Sandia Corp., 941 F.2d 1124 (10th Cir. 1991). An abuse of discretion is not merely an error of law or judgment, but is an overriding of the law by a manifestly unreasonable judgment or as a result of prejudice, bias or ill will shown by evidence or the record of the proceedings. United States v. Wright, 826 F.2d 938 (10th Cir. 1987). Rather than assessing whether the District Court's decision was arbitrary or manifestly unreasonable, the panel concluded that a witness who violated the sequestration order could be excluded only upon a showing of "probable prejudice."

The approach taken by the courts in Jerry Parks Equipment Co., supra, and Clavis, supra, which gives greater deference to the decision of the District Court, is the better reasoned approach. In Holder, this Court recognized that the

decision whether to exclude a witness under particular circumstances rests within the "sound discretion of the trial court." Id. 150 U.S. at 92. The Court also noted that there would be few cases where the discretion of the trial court in this regard would be reversed, stating, "clearly, the action of the court in admitting the testimony will not, ordinarily, be open to revision." Id.

This deferential standard of review is necessary because the trial court, which has observed all of the evidence and is familiar with the dynamics of the trial, is in a superior position to determine if evidence heard by an ostensibly sequestered witness will have a prejudicial impact on the opposing party. This standard is necessary because of the high likelihood of prejudice whenever a witness violates a sequestration order. The likelihood of unfair prejudice in such situations has been repeatedly recognized. See United States v. Ell, 718 F.2d 291 (8th Cir. 1983) (refusal to sequester a witness upon the request of a party creates a presumption of reversible error which can only be rebutted if it is manifestly clear that no prejudice occurred). See also United States v. Burgess, 691 F.2d 1146 (4th Cir. 1982); United States v. Brewer, 947 F.2d 404 (9th Cir. 1991); United States v. Jackson, 60 F.3d 137 (2nd Cir. 1995) all recognizing a presumption of prejudice when a request for sequestration is denied. Similar concerns over unfair prejudice lead to the adoption of Rule 615, Fed.R.Evid. Rule 615 removed the discretion that a trial court had under common law to grant or deny a request that witnesses be sequestered and requires a trial court to enter an order of sequestration at the request of either party. See United States v. Greschner, 802 F.2d 373 (10th Cir. 1986).

The degree of potential prejudice is great whenever a witness violates a sequestration order because it could not only

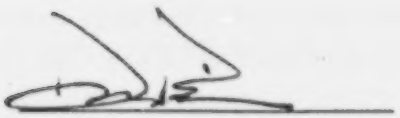
allow a witness to mirror testimony from other witnesses, but could also allow a witness to hear and observe the cross examination questions and techniques of opposing counsel and gain an unfair opportunity to prepare his or her responses. This is true even if the violating witness is only in the courtroom for a short period of time. The witness still may overhear or observe a key question which otherwise would have caught him or her off guard. A witness's reaction and response to such unexpected questions is often more revealing than the witness's responses to the rest of counsel's cross examination. A witness's overhearing one such question could be more prejudicial than a witness's sitting through a long period of testimony unrelated to the witness.

A true abuse of discretion standard of review in which the appellate court inquires whether the trial court's decision is clearly without any reasonable support in the record is preferable to a standard where the Circuit Court undertakes what is essentially a de novo inquiry into the existence of probable prejudice or bad faith on the part of the party calling the witness. This standard recognizes that the District Court is in a superior position to identify the harmful effect a violation may have had, but which might not be apparent from a sterile appellate record. It also better serves to promote the policies behind Rule 615, Fed.R.Evid.

## CONCLUSION

A writ of certiorari should issue to review the decision of the Tenth Circuit and to resolve the conflict among the Circuit Courts over the proper standard of review for an order excluding testimony from a witness who has violated a sequestration order.

Respectfully submitted,



GARY C. PIERSON
Counsel of Record
Nathan L. Whatley
Lytle Soulé & Curlee, P.C.
Attorneys for Petitioners
1200 Robinson Renaissance
119 N. Robinson
Oklahoma City, Oklahoma 73102
(405) 235-7471

**APPENDIX**

**PUBLISH**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

| | | |
|---|---|---|
| VURLA B. BURKS, | ) | |
| Plaintiff- Appellant, | ) | |
| | ) | No. 94-6403 |
| v. | ) | |
| | ) | |
| THE OKLAHOMA PUBLISHINGCOMPANY and RICHARD A. CLARK, | ) | |
| | ) | |
| Defendants - Appellees. | ) | |

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-93 663-W)

---

Joseph R. Weeks, Oklahoma City University School of Law, Oklahoma City, Oklahoma (Jan Preece Gaddis, Duncan, Oklahoma, with him on the briefs), for Plaintiff- Appellant.

Nathan L. Whatley (Gary C. Pierson with him on the briefs) of Lytle Soule & Curlee, Oklahoma City, Oklahoma, for Defendants - Appellees.

---

Before SEYMOUR, Chief Judge, COFFIN• and McKAY, Circuit Judges.

•The Honorable Frank M. Coffin of the United States Court of Appeals for the First Circuit, sitting by designation.

McKAY, Circuit Judge.

Plaintiff Vurla Burks brought this action pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e 1 to -17. She alleged that the Defendants, the Oklahoma Publishing Company ("OPUBCO") and Richard Clark, impermissibly discriminated against her by constructively discharging her based on her age and her sex. The jury returned a verdict for the Defendants, and Ms. Burks now appeals. She asserts that the district court made several errors during the course of the proceedings. For the reasons that follow, we affirm in part and reverse and remand in part.

Ms. Burks was an OPUBCO employee for twenty-eight years. She spent her last two years of employment as a supervisor in the telecommunications department. Ms. Burks began to feel that her job was in jeopardy when Mr. Clark informed her that he would not authorize $16 for Ms. Burks to have new business cards printed. A few months later, Mr. Clark confronted Ms. Burks with the accusation that she had listened in on the telephone calls of OPUBCO's president. In a meeting with Mr. Clark, Ms. Burks twice asked him whether her services would be needed in the future. According to Ms. Burks, Mr. Clark simply stared at her for twenty to twenty-five seconds, rather than responding to her questions. From this Ms. Burks concluded that she would be fired if she did not resign. Thus, at the age of 61, Ms. Burks resigned from her position with OPUBCO. She then brought this suit alleging that she was constructively discharged on the basis of her age and her sex.

Ms. Burks raises four issues on appeal. First, she contends that the district court erred when it refused to give the jury her requested instruction on constructive discharge. In her second and third issues, Ms. Burks argues the district court improperly refused to allow her to add a witness to her witness list and then erred when it would not allow the same witness to testify in rebuttal after the witness violated a sequestration order. Finally, Ms. Burks argues that the district court abused its discretion when it denied her motion to compel discovery.

**I. Constructive Discharge Jury Instruction**

Under the ADEA, an employer may not "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. §623(a)(1). To prove constructive discharge, the employee must show that her "employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign. "Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986). We have held that this formulation of the constructive discharge standard also constitutes the "paradigmatic" jury instruction in a constructive discharge case. Mitchell v. Mobil Oil Corp., 896 F.2d 463, 468 (lOth Cir.), cert. denied, 498 U.S. 898 (1990). We noted, however, that the trial court should "tailor this instruction to fit the facts of the case." Id.

In this case, the district court gave to the jury the paradigmatic instruction we contemplated in Mitchell. Ms. Burks believed, however, that an additional instruction was necessary to address adequately the facts of her case. Specifically, she asked the district court to instruct the jury that

"an employee is constructively discharged if the employer's actions reasonably lead the employee to conclude that, if she does not resign, she will be discharged." Appellant's App. at 22. Ms. Burks argues that the district court erred when it failed to give this instruction. We "will find reversible error in a trial court's jury instructions only if we have substantial doubt whether the instructions, taken together, properly guided the jury in its deliberations." Mitchell, 896 F.2d at 468.

This court has recognized that an employee can prove a constructive discharge by showing that she was faced with a choice between resigning or being fired. See, e.g., Acrey v. American Sheep Industry Ass'n, 981 F.2d 1569, 1573-74 (10th Cir.1992) (employee told to resign or she would be fired); Spulak v. K Mart Corp., 894 F.2d 1150, 1154 (10th Cir. 1990) (employee faced with choice between early retirement or being fired). Thus, a district court could properly give an instruction similar to the one requested by Ms. Burks if the facts of the case warranted it. Ms. Burks argues that she was presented with a choice between being fired and resigning. As proof of this, she offers the fact that Mr. Clark did not respond when she asked about her future with the department. She also offers the fact that Mr. Clark refused to authorize an expenditure for new business cards. We believe, however, that these facts are at best ambiguous as to whether Ms. Burks truly was presented with a choice between resigning or being fired. Thus, we cannot say that we have substantial doubt whether the jury was properly guided in its deliberations as a result of the district court's refusal to give the jury Ms. Burks' requested instruction. We hold that the district court did not err in this regard.

**II. Amendment to Witness List**

In its scheduling order, the district court required the

parties to submit their final witness lists by March 1, 1994, and to complete discovery by April 1, 1994. Appellant's App. at 1. The trial was originally scheduled to begin sometime in early May. On April 12, 1994, Ms. Burks filed a motion seeking to supplement her witness list. The one-page motion did not identify any witness by name.

Appropriately, the district court denied the motion. Then, on April 21, 1994, Ms. Burks filed a more specific motion in which she identified four proposed witnesses. On May 4, 1996, the district court allowed the addition of two of the four, but refused the addition of the other two. Ms. Burks now challenges this refusal with respect to one proposed witness. Ms. Burks argues that this proposed witness, a co-worker, is essential to her case because she is an unbiased witness who can substantiate the intolerable conditions under which Ms. Burks worked.

Federal Rule of Civil Procedure 16(b) gives district courts wide latitude in entering scheduling orders. Rule 16(b) also provides that such orders shall not be modified "except upon a showing of good cause and by leave of the district judge." Thus, we review a district court's refusal to modify a scheduling order for abuse of discretion. SIL-FLO, Inc. v. SFHC, Inc., 917 F.2d 1507, 1518 (10th Cir. 1990). In the context of a decision to exclude a witness not listed in a pretrial order, we consider four factors to determine whether the district court abused its discretion:

> "(1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would

> disrupt the orderly and efficient trial of the case or of other cases in court, and (4) bad faith or willfulness in failing to comply with the court's order.

Smith v. Ford Motor Co., 626 F.2d 784, 797 (10th Cir. 1980) (quoting Meyers. v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 904 05 (3d Cir. 1977)), cert. denied, 450 U.S. 918 (1981).[1]

We believe that the first two factors weigh in favor of Ms. Burks. Defendants may have been surprised that Ms. Burks would seek to add a new witness at such a late date, but they could not have been surprised, given the circumstances of the case, that Ms. Burks would want to introduce the corroborating testimony of a co-worker. Additionally, it is unlikely that any prejudice to the Defendants would have occurred because the co-worker's proposed testimony would not have introduced any new issues other than witness credibility. If any surprise or prejudice did occur, Defendants could have cured it easily. The proposed witness was one of Defendants' employees. Thus, they could have interviewed or deposed her without difficulty.

The last two factors, however, weigh in favor of Defendants. It appears from the record that the addition of new witnesses at such a late date threatened to delay the trial. Although the trial did not actually begin until the last week of May, it apparently was originally scheduled to begin in early May. See Appellant's App. at 159 no. 69 (district court docket

---

1 Although the Smith rule addresses the modification of a final pretrial order, we discern no reason why it should not also apply to a decision to modify a scheduling order before a final pretrial order has been entered.

sheet, entry of May 12 continuing trial till May 23). In an April 26 hearing before the district court, defense counsel complained about the addition of new witnesses "eight work days before the trial." Appellees' App. at 237. Although neither party has informed this court when the trial was originally scheduled to begin, it appears that the beginning of the trial was imminent when Ms. Burks identified her new proposed witnesses. In this context it is reasonable to believe that allowing Ms. Burks to add new witnesses to her witness list would have caused a postponement of the trial, despite the witnesses' ready availability. Defense counsel would have wanted to depose or interview any new witness and potentially would have to depose further individuals, as well as rework its trial strategy.

Finally, we do not find that plaintiff's counsel acted with bad faith or willfulness, but we do believe that his conduct certainly bordered on it. In the April 26 hearing at which the additional witnesses were discussed, the district court attempted to determine whether these witnesses' testimony would be at all relevant to the case. Plaintiff's counsel refused to give explicit answers in front of defense counsel. Despite the court's warning that it would not add the witnesses if it could not determine their relevance, Ms. Burks's counsel continued to refuse to discuss the matter in open court. Appellees' Supp. App. at 235-36.

Additionally, we point out that Ms. Burks has given conflicting reasons for her failure to add witnesses to the witness list in a timely fashion. Initially, Ms. Burks represented to the district court that she did not know of the importance of her new proposed witnesses because discovery had not been completed. Appellant's App. at 3 (Plaintiff's Motion to Supplement Witness and Exhibit Lists). Later, in the district court, and again on appeal, Ms. Burks asserted that the names

were not added to the witness list through simple inadvertence. Appellant's App. at 8 (Plaintiff's Motion to Reconsider and Brief in Support); Appellant's Br. at 23. Such inconsistent statements may be taken as evidence that counsel made a conscious decision to act as he did. See SIL-FLO, Inc., 917 P.2d at 1519 (stating that inconsistent statements in counsel's motions may be evidence that inaction was a tactical decision rather than a simple mistake). Although perhaps not willful, we believe that this behavior represents more than simple negligence. In consideration of all the factors discussed above, we hold that the district court did not abuse its discretion in refusing to allow Ms. Burks to add the co-worker to her witness list.

## III. Disqualification of Rebuttal Witness for Violation of Sequestration Order

After the district court's refusal to add the co-worker to the witness list, Ms. Burks decided to take advantage of the fact that rebuttal witnesses do not need to be listed in the pretrial order or the scheduling order. Her plan to present the co-worker as a rebuttal witness went awry, however, when the co-worker violated the district court's sequestration order by entering and remaining in the courtroom for several minutes during another witness's testimony. The district court refused to let the co-worker testify as a result of the violation. Ms. Burks claims on appeal that this refusal is reversible error.

When a witness violates a sequestration order, it is within the district court's discretion to admit or exclude the witness's testimony. United States v. Buchanan, 787 F.2d 477, 485 (10th Cir. 1986). The Supreme Court has stated, however, that the witness generally should not be disqualified:

> If a witness disobeys the order of withdrawal, while he may be proceeded against for contempt and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court.

Holder v. United States, 150 U.S. 91, 92 (1893). Our cases have recognized that [p]robable prejudice should be shown for such exclusion to occur".[2] Id. Here, the co-worker overheard approximately ten minutes of testimony. Even liberally construing the time frame in which the violation occurred, the record reveals that the co-worker did not hear anything related to her proposed testimony. The co-worker was to testify about Ms. Burks's working conditions. While the co-worker was in the courtroom, however, the testimony only concerned another worker's claims against OPUBCO and the circumstances surrounding the other worker's move to Cleveland.[3] Thus, no

---

2 Although some of our cases have simply referred to the standard of review as abuse of discretion, it is clear in each case that the court went on to examine whether any prejudice had occurred. See e.g., United States v. Prichard, 781 F.2d 179, 183 (10th Cir. 1986) (stating that standard of review is prejudice or abuse of discretion; examining whether prejudice occurred); United States v. Johnston, 578 P.2d 1352, 1355-56 (10th Cir.) (stating that standard of review is abuse of discretion; noting that counsel did not act in bad faith and that witness's testimony was not affected by violation), cert. denied, 439 U.S. 931 (1978).

3 Defendants argue that the co-worker also heard testimony concerning an alleged affair Mr. Clark had. Support in the record for this contention is weak. Assuming, however, that Defendants are correct, it is unlikely

prejudice to Defendants occurred as a result of the co-worker's temporary presence in the courtroom. Furthermore, no evidence exists that Ms. Burks or her counsel knew of, or in bad faith allowed, the co-worker's violation of the sequestration order. We hold that the district court abused its discretion when it prevented the co-worker from testifying.[4] Finally, the error was not harmless. Unlike the other witnesses who could describe Ms. Burks's working conditions, this co-worker was not subject to attack for bias because she did not have a lawsuit pending against Defendants. As a result her testimony was potentially very important to Ms. Burks's case. Thus, Ms. Burks is entitled to a new trial.

## IV. Motion to Compel

In her interrogatories, Ms. Burks asked Defendants to identify all persons over forty years of age who were employed as managers or supervisors for the last ten years. She also asked Defendants to identify any employees or applicants who have made age or sex discrimination complaints in the last ten years. Defendants refused to provide this information, objecting that it was overbroad and irrelevant. The district court summarily denied Ms. Burks's motion to compel discovery of this

---

they suffered any prejudice. Although the co-worker's proposed testimony dealt with the alleged affair, the testifying witness merely admitted that she had never personally seen any signs of an affair. Appellees' Supp. App. at 93. Thus, it is difficult to see how the co-worker would have altered her testimony as a result of her violating the sequestration order.

4 Defendants also argue that the co-worker was an improper rebuttal witness. The district court appears, however, to have accepted her as a rebuttal witness, and we will not overturn this decision absent an abuse of discretion. We find no evidence indicating that such an abuse occurred.

information. We review a district court's discovery orders for an abuse of discretion. Gomez v. Martin Marietta Corp., 50 F.3d 1511, 1520 (10th Cir. 1995).

"As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent." Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (10th Cir. 1990). A plaintiff may be allowed "extensive" discovery in order to prove his or her case. See Rich v. Martin Marietta Corp., 522 F.2d 333, 343 (10th Cir. 1975). Nevertheless, "'this desire to allow broad discovery is not without limits and the trial court is given wide discretion in balancing the needs and rights of both plaintiff and defendant.'" Gomez, 50 F.3d at 1520 (citation omitted).

Here, Ms. Burks requested information for the past ten years. The district court certainly could conclude that discovery of information this far in the past would be overburdensome and irrelevant. We decline to say that such a request would never be warranted. Rather, we simply hold that the district court did not abuse its discretion in this case.

We AFFIRM in part, REVERSE in part, and REMAND for a new trial.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| VURLA B. BURKS, Plaintiff, | ) | |
| v. | ) | Case No. CIV-93-663-W |
| OKLAHOMA PUBLISHING COMPANY, et al., Defendants. | ) | |

JUDGMENT

This matter came on for trial before the Court sitting without a jury on the plaintiff, Vurla Belle Burks' claim of sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. and before a jury on the plaintiff's claims of Age Discrimination in Employment Act of 1967, 29 U.S C. § 621, et seq. and wrongful discharge in violation of Oklahoma's public policy as set forth in Oklahoma's Anti-Discrimination Act, Okla. Stat. tit. 25 § 1101, et seq. The issues have been duly tried and the Court having rendered its decision and the jury having rendered its verdict,

It is ORDERED AND ADJUDGED that judgment be entered in favor of the defendants, Oklahoma Publishing Company and Richard A. Clark, and against the plaintiff, Vurla Belle Burks, and that the defendants, Oklahoma Publishing Company and Richard A. Clark, recover of the plaintiff their costs of action.

ENTERED this 25th day of July,. 1994.

LEE R. WEST
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| VURLA B. BURKS, Plaintiff, | ) | |
| v. | ) | Case No. CIV-93-663-W |
| OKLAHOMA PUBLISHING COMPANY, et al., Defendants. | ) | |

ORDER

This matter came on for trial before the Court sitting without a jury on the plaintiff, Vurla Belle Burks' claim of sex discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, et seq. Having considered the evidence and argument of counsel, the Court makes the following findings of fact and conclusions of law regarding the plaintiff's claim.

Findings of Fact

1. The plaintiff, Vurla Belle Burks, brings this Title VII claim against the defendant, Oklahoma Publishing Company, alleging that she was constructively discharged by the actions of the defendant, Richard A. Clark, to enable him to replace her with a woman with whom he was engaged in a romantic or sexual relationship.

2. The plaintiff, a female, was employed by the defendant, Oklahoma Publishing Company, as telecommunications manager, at all times relevant to this

lawsuit.

3. The plaintiff's immediate supervisor was the defendant, Richard A. Clark.

4. On Friday, May 17, 1991, the plaintiff resigned her position with the defendant, Oklahoma Publishing Company.

5. Linda Scales was promoted to the plaintiff's position by the defendant, Richard A. Clark, on Monday, May 20, 1991.

6. The Court finds that the plaintiff has presented no credible evidence that the defendant, Richard A. Clark, and the plaintiff, Linda Scales, were engaged in a romantic or sexual relationship. Rather, the Court finds that the plaintiff has presented no credible evidence that the defendant, Richard A. Clark, desired to engage in a romantic or sexual relationship with Linda Scales.

Conclusions of Law

1. The Court has subject matter jurisdiction over this matter pursuant to 42 U.S.C. 2000e-5(f)(3) and 28 U.S.C. § 1331.

2. Venue is proper in this judicial district pursuant to 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1391(b).

3. Section 2000e-2(a)(1) provides that:

> "It shall be an unlawful employment practice for an employer--(1) . . .to discharge any individual

. . . because of such individual's . . . sex . . . .

4. In the Court's Order of May 24, 1994 addressing the defendants' motion for summary judgment, the Court, following the decision in King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985), found that a cognizable cause of action for sex discrimination exists if a plaintiff is constructively discharged so as to allow the supervisor to give the plaintiff's position to a woman with whom he is having a sexual or romantic relationship.

5. In this case, the plaintiff has no direct evidence of intentional sex discrimination. Thus, the plaintiff must follow the framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 7982 (1973), for disparate treatment claims. Under the McDonnell Douglas framework, as recently reaffirmed and refined by the Supreme Court in St. Mary's Honor Center v. Hicks, 1134 S. Ct. 2742 (1993), the plaintiff must first establish a prima facie case of discrimination. If the plaintiff carries her initial burden, the burden shifts to the defendant to articulate some legitimate non-discriminatory reason for the challenged employment action. If the defendant carries this burden of production, the prima facie case drops out and the plaintiff has the ultimate burden of proving that the actions of the employer were motivated by unlawful discrimination rather than the reason offered. id. at 2746-48.

6. To establish a prima facie case of sex discrimination in this case, the Court finds that the plaintiff must prove by a preponderance of the evidence that (1) she is a woman, (2) she was qualified for her job, (3) she was discharged, or here, constructively discharged, and (4) she was replaced by a woman who was engaged in a romantic or sexual relationship with the supervisor responsible for her discharge

and the promotion of the other woman.

7. The Court finds that the plaintiff failed to establish by a preponderance of the evidence a prima facie case of sex discrimination. The plaintiff did not demonstrate that the defendant, Richard A. Clark, and Linda Scales were engaged in a romantic or sexual relationship.

8. Because the plaintiff did not demonstrate that she was replaced by a woman with whom the defendant, Richard A. Clark, was engaged in a romantic or sexual relationship, the Court need not address the other elements of the prima facie case of sex discrimination.

9. The Court concludes that the defendant, Oklahoma Publishing Company, is entitled to judgment in its favor on the plaintiff's claim of sex discrimination under Title VII. Judgment shall issue accordingly.

ENTERED this 25th day of July,. 1994.

LEE R. WEST
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

| | | |
|---|---|---|
| VURLA B. BURKS, | ) | |
| | ) | |
| Plaintiff - Appellant, | ) | |
| | ) | |
| v. | ) | Case No. 94-6403 |
| | ) | |
| OKLAHOMA PUBLISHING COMPANY and RICHARD A. CLARK, | ) | |
| | ) | |
| Defendants - Appellees. | ) | |

ORDER
Entered May 21, 1996

Before SEYMORE, Chief Judge COFFIN* and McKAY, Circuit Judges.

* The Honorable Frank M. Coffin of the United States Court of Appeals for the First Circuit, sitting by designation.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER, Clerk

By Opal A. Carter
Deputy Clerk